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In The

Supreme Court of the United States

OCTOBER TERM, 1950

No.

THE LE ROY DYAL COMPANY, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Le Roy Dyal Company, Inc., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on December 28, 1950.

OPINION BELOW.

The findings of fact and conclusions of law in the District Court (R. 77a) are not reported. The opinion of the Court of Appeals (R. 84) is reported in 186 F. 2d 460.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 28, 1950 (R. 91). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED.

Whether a provision in a standard form contract of a public agency assessing so-called "liquidated damages" should be denied enforcement as a penalty, when the provision is applied in a situation where it bears no reasonable relation to actual damages, when it applies to breaches of any of a number of regulations of varying character, some of which could not possibly cause any actual damages to the agency, and when the "liquidated damages" are at a rate some sixty times the interest of the other party in the transaction?

STATEMENT.

Petitioner is a dealer in potatoes with offices in Cranbury, New Jersey. On July 15, 1947 petitioner signed a standard form "Dealer Agreement" of the Commodity Credit Corporation (hereafter "Corporation"), whereunder it agreed to participate in the 1947 crop Irish potato price support program as a dealer (R. 2a).

Under the contract petitioner was obliged to purchase and sell only eligible potatoes* of eligible vendors** and to pay a price not less than the applicable support price, if any, for all potatoes purchased (R. 4a). The applicable support price for U.S. #1 grade

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* "Eligible potatoes" are defined as potatoes of the 1947 crop produced by eligible growers and not objectionable because of disease, insect infestation, frost, or other reasons (R. 3a-4a).

** "Eligible vendors" include growers who have been determined by County Agricultural Conservation Committees to be eligible for participation in the program; dealers who have entered into a Dealer Agreement with the Corporation; and others specifically approved by the Corporation (R. 3a).

potatoes was stated in an annex to the contract to be $2.45 per hundredweight for July and August (R. 15a). The contract provided that if the dealer made any purchases or sales of potatoes at variance with any of these obligations he would pay to the Corporation as "liquidated damages" the sum of $3.00 per hundredweight or fraction thereof of potatoes so purchased or sold" (R. 8a-9a).* The contract further provided that this payment was not intended to take the place "of any obligation to Dealer to refund to CCC any monies which he collected without being entitled thereto" nor to exclude any other relief to which the Corporation might be entitled apart from its claim for damages (*Ibid.*).

In the 1947 price support program, the Corporation supported the price only of U.S. #1, U.S. #1 size B and U.S. #2 grade potatoes (R. 40a). It did not support the price of "commercial grade" potatoes, which were inferior in quality to U.S. #1 grade and sold at a lower price (R. 38a, 45a). Under the Dealer Agreement, however, dealers were authorized to purchase

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* "*Article* 11. *Liquidated Damages.* In the event Dealer purchases ineligible potatoes or potatoes of an ineligible grower or pays for potatoes less than the applicable support price or fails to comply with directions of CCC to withhold certain potatoes from market, or sells ineligible potatoes belonging to another person or sells potatoes belonging to an ineligible grower, the parties hereto agree, in view of the difficulty of ascertaining the exact damages suffered by CCC as a result of such actions, that such damages shall be $3.00 per hundredweight or fraction thereof of potatoes so purchased or sold and that Dealer will pay said amount to CCC, as compensation and not as a penalty. Inasmuch as payment of $3.00 is not intended to take the place of any obligation of Dealer to refund to CCC any monies which he collected without being entitled thereto, this provision for liquidated damages or payment of such damages shall not preclude or invalidate claims of CCC for such refunds. Neither shall this provision exclude any other relief, at law or in equity, to which CCC may be entitled apart from its claim for damages." (R. 8a-9a).

"commercial grade" potatoes only from eligible growers.

In the 1947 season petitioner purchased and sold in its operations a total of 237,030 hundredweights of potatoes (R. 74a), grossing about 5¢ per hundredweight (R. 69a).

Between August 5, 1947 and September 12, 1947, petitioner purchased 3,674 hundredweight of potatoes from one Richard Wright, who represented himself to be an eligible grower (R. 64a-65a, 78a). Petitioner accepted Wright's representation as a basis for dealing with him and did not verify the representation as he could have done by contacting the office of the Corporation or of the County Assistant in Conservation in neighboring towns (R. 71a-72a, 79a).

The potatoes purchased from Wright were commercial grade potatoes (R. 38a). The potatoes were sold by petitioner to its regular customers at prices ranging from $2.00 to $2.30 per hundredweight for size A potatoes and 75¢ to $1.50 for size B potatoes (R. 67a-68a). Certain of the potatoes obtained from Wright turned out to be afflicted with "soft rot" and were not marketable (R. 68a). None of the potatoes purchased from Wright were sold to the Corporation (R. 24a), nor could they have been so sold; the Corporation in 1947 was not supporting and did not purchase any commercial grade potatoes (R. 43a-44a, 55a).

More than a year later, the Corporation noted that petitioner had reported that it had made purchases of potatoes from Raymond Wright and determined that the said Wright was not an eligible grower (R. 49a). On January 3, 1950 respondent brought suit in the United States Court for the District of New Jersey demanding judgment in the sum of $11,022 with interest, being $3.00 for each hundredweight of potatoes

obtained by petitioner from Wright on the ground that petitioner had breached its agreement with the Corporation by purchasing potatoes from an ineligible grower (R. 1a).

The District Court found that petitioner had purchased potatoes from Raymond Wright on his representation that he was an eligible grower, that Wright was not an eligible grower as defined in the contract, and that there was no proof of any actual damage suffered by the Corporation as a result of this purchase (R. 77a-79a). The District Court concluded that the provision in the contract providing for the assessment of liquidated damages was "unenforceable as it is in the nature of a penalty under the circumstances shown in this case" (R. 79a-80a), and returned judgment for respondent for nominal damages (R. 80a).

Respondent appealed to the United States Court of Appeals for the Third Circuit. The Court of Appeals noted that neither side criticized the findings of the District Court (R. 84). The Court of Appeals considered the provision in issue to be comparable to provisions for liquidated damages for delay in Government contracts and for breach of exclusive dealing agreements between cooperative marketing associations and their members and that the amount provided for was not excessive (R. 88-90). On December 28, 1950, the Court of Appeals entered its judgment reversing the judgment of the District Court (R. 91).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that a provision in a standard form contract between the Commodity Credit Corporation and a dealer in potatoes was an enforceable provision

for liquidated damages rather than an invalid and unenforceable provision for a penalty.

2. In failing to hold that a provision for liquidated damages in a standard form contract between the Commodity Credit Corporation and a dealer in potatoes assessing damages against the dealer at a rate 60 times the earnings of the dealer in any transaction not in accordance with the regulations of the Corporation was excessive and could have been intended only as a penalty to be held *in terrorem* over the dealer and not as a reasonable pre-estimate of damages to be anticipated from a breach.

3. In failing to hold that a provision in a contract stipulating the same exorbitant sum as liquidated damages for any of a number of defaults of widely varying character and consequence including defaults of the most trivial nature which could not possibly result in any actual damage to the promisee was unenforceable as a penalty.

4. In failing to hold that a provision in a contract between the Commodity Credit Corporation and a dealer in potatoes calling for the payment of $3.00 per hundredweight as "liquidated damages" by a dealer who grossed about 5¢ on each hundredweight of potatoes handled where the dealer purchased potatoes of a grade which could not be sold to the Corporation from a farmer who represented himself to be but was shown a year later not to have been an "eligible" grower and where the promisee failed to show any actual damages from the breach was unenforceable as a penalty.

5. In reversing the judgment and order of the District Court.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT, AND OF OTHER COURTS OF APPEALS, AS TO THE PRINCIPLES ON WHICH TO DETERMINE WHETHER SO-CALLED "LIQUIDATED DAMAGES" PROVISIONS WILL BE ENFORCED.

The enforceability of provisions in agreements fixing damages in the event of a future breach has been several times before this Court, most recently in *Priebe & Sons, Inc.* v. *United States,* 332 U.S. 407. In the *Priebe & Sons* case, the Court held, as it had consistently held or stated in earlier cases, that a "liquidated damage" clause setting damages in such an exorbitant amount that it must have been intended to spur performance and to be held *in terrorem* over the promisor and bearing no relation, at the time the contract was drawn, to a reasonable forecast of just compensation for the injury to be anticipated from a breach, will be refused enforcement as a penalty. *Kothe* v. *R. C. Taylor Trust,* 280 U.S. 224; *Irving Trust Co.* v. *A. W. Perry, Inc.,* 293 U.S. 307; *Wise* v. *United States,* 249 U.S. 361; *United States* v. *Bethlehem Steel Co.,* 205 U.S. 105; *Sun Printing and Publishing Assn.* v. *Moore,* 183 U.S. 642. See Restatement, Contracts, §339; Williston, Contracts, §§776-788; Corbin, Contracts, §§1057-1072. The principles apply, of course, to contracts between agencies of the government and private parties as well as to wholly private contracts. *Priebe & Sons, Inc.* v. *United States, supra,* at p. 411.

The decision of the court below in the instant case appears to be in conflict with the above decisions, and with decisions in other courts of appeal. The court,

we believe, has failed to give effect to the principles which they enunciate, as applied to the undisputed facts in this case. There are two respects in which the discrepancies are most glaring.

A. *THE AMOUNT STIPULATED AS DAMAGES IN PETITIONER'S CONTRACT WAS EXORBITANT, AND ALL OUT OF PROPORTION TO ANY POSSIBLE ACTUAL DAMAGES WHICH COULD HAVE BEEN ANTICIPATED BY THE CORPORATION.*

In *Kothe* v. *R. C. Taylor Trust,* 280 U.S. 224, the Court in refusing enforcement of a so-called "liquidated damage" clause stated (p. 226):

> "The amount thus stipulated is so disproportionate to any damage reasonably to be anticipated in the circumstances disclosed that we must hold the provision is for an unenforceable penalty."

Again, in *Priebe & Sons, Inc.* v. *United States, supra,* the Court refused enforcement of a so-called "liquidated damage" clause assessing damages for failure of a contractor to get ready to perform where another "liquidated damage" clause protected the Government against any possible actual delay in performance, stating (332 U.S. at p. 413):

> "Under these circumstances this provision for 'liquidated damages' could not possibly be a reasonable forecast of just compensation for the damage caused by a breach of contract. It might, as respondent suggests, have an *in terrorem* effect of encouraging prompt preparation for delivery. But the argument is a tacit admission that the provision was included not to make a fair estimate of damages to be suffered but to serve only as an added spur to performance. It is well-settled

> contract law that courts do not give their imprimatur to such arrangements."

See also *Wise* v. *United States,* 249 U.S. 361, 365. The decisions in the courts of appeal are to the same effect. *Davy* v. *Crawford,* 147 F. (2d) 574 (App. D. C. 1945); *Massman Construction Co.* v. *City Council,* 147 F. (2d) 925 (5th Cir. 1945).

The *in terrorem* feature of the contract provisions here involved may best be illustrated by the exorbitant magnitude of its effect on the operations of petitioner—or any other dealer in potatoes. On each hundredweight of potatoes handled, petitioner stood to earn about five cents (R. 69a). Yet for each mistake he or any of his employees made—intentionally or, as here, inadvertently—he was to become liable to the corporation at the rate of $3.00 per hundredweight, sixty times or 6000 percent of the earnings he stood to make from the transaction.

On petitioner's operations for the entire 1947 season during which he handled 237,030 hundredweight of potatoes he stood to gross $11,850 if he succeeded in realizing 5¢ on each hundredweight handled. Yet the "liquidated damages" on account of his purchases from one farmer who represented himself to be but a year later was shown not to be an "eligible grower", which in the aggregate accounted for only 1.5% of his season's business, totals $11,022, the sum herein demanded by the Corporation. If his season's operations had turned out to have been unauthorized, this one dealer operating in a local area in New Jersey with annual gross earnings on his potato business on the order of $11,000 would have become obligated to the Corporation in the sum of $700,000!

Conceivably, but just conceivably, a case might be stated where such a formidable penalty for a contract

breach could be a fair approximation of probable damages to the promisee, but that is not this case. Here, even a cursory glance at the position of the corporation makes it clear that its objective in framing the clause for "liquidated damages" to be included in its standard form Dealer Agreement was to enforce compliance with all of the provisions of that agreement and not to compensate it for losses attributable to breaches thereof. In failing to give effect to this fact, the decision of the Court below is in probable conflict with the decision of the United States Court of Appeals for the District of Columbia in *Davy* v. *Crawford, supra*, where the Court held (147 F. (2d) at p. 575):

> "If, on the other hand, it appears that the stipulation is designed to make the default of the party against whom it runs more profitable to the other party than performance would be, it will be void as a penalty."

That is patently the situation here.

The top grade of potatoes supported by the Corporation was U.S. #1. In July and August of 1947 the support price of this grade, in the area in New Jersey in which petitioner was operating, was $2.45, in new bags and loaded on a through carrier (R. 37a). In September, the figure went up 10¢ to $2.55 (*ibid.*). These potatoes, however, are not comparable to the ones involved here, which were "commercial" grade, of varying size and quality; this lower grade was not supported by the Corporation (R. 38a). They could not have been sold to the Corporation (R. 55a), and were in fact sold (except for those which were wholly unmarketable) to commercial outlets at much lower prices varying from 75¢ to $2.30 per hundredweight (R. 67a-68a).

At the trial, however, the Corporation attempted to abate the force of this evidence by asserting that these "commercial" grade potatoes replaced other potatoes on the market, so that it thus was required to purchase other "eligible potatoes" and was thereby damaged (R. 54a). The District Court did not so find (R. 79a). Nevertheless, even were we to assume that the assertion were true, the maximum amount of damages which the Corporation could have suffered was the $2.45 to $2.55 support price less what it might recoup by sale for export or non-food uses. Damages could not reasonably exceed the support price, which represented the maximum cost to the Corporation of potatoes ordered destroyed on the farm.

On May 23, 1947, just seven weeks prior to the time the Corporation submitted this standard form Dealer Agreement to petitioner for signature, the Corporation knew that the net cost to it of any potatoes purchased would be substantially less than the support price. The support price, of course, was stated in the contract itself (R. 15a). On May 23, 1947, the Department of Agriculture reported to Congress on its experience in 1946 and its plans for 1947.* The Department reported that in 1946 the Corporation had purchased 90-100 million bushels, which is equivalent to 54-60 million hundredweight and that the net overall cost of the program had been approximately $80,000,000. In other words, the net cost to the Corporation of potatoes purchased under the program in 1946 was on the order of $1.38 to $1.48 per hundredweight.

Thus, assuming the worst possible consequences to the Corporation from petitioner's breach, the "liquidated damages" exceeded the *maximum potential* dam-

* 93 Cong. Rec. 5731 (May 23, 1947)

ages attributable to the breach by not less than 45¢ per hundredweight, and to the extent 1946 experience was relevant, by about $1.50 per hundredweight, or an amount from nine to thirty times the amount petitioner stood to make on the transaction.* Since it is unlikely that the Corporation would suffer the maximum potential damages on each hundredweight of potatoes which petitioner bought contrary to its regulations, the Corporation stood to profit enormously from unauthorized transactions of participating dealers—a consequence which this and other courts have not countenanced in considering provisions in contracts calling for the payment of "liquidated damages". *Kothe* v. *R. C. Taylor Trust,* 280 U.S. 224; *Davy* v. *Crawford,* 147 F. (2d) 574 (App. D. C. 1945); *Massman Construction Co.* v. *City Council,* 147 F. (2d) 925 (5th Cir. 1945); *c. Priebe & Sons, Inc.* v. *United States, supra.*

The "liquidated damages" in the Agreement in issue may be compared with the penalties established by Congress in the Agricultural Adjustment Act of 1938, 52 Stat. 31, 55 Stat. 203, 7 U.S.C. §§1281 *et seq.,* to be assessed against noncooperating farmers marketing produce in excess of their quotas. These penalties were designed like those in issue here to hinder the marketing of farm commodities in excess of quotas established by the Secretary of Agriculture in order to

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* In terms of petitioner, a small local dealer, the figures are deceptively small. However, in 1947, the total United States potato crop was 233,428,800 cwt. *Statistical Abstract of the United States* (1949) p. 679. Had this entire crop been covered by the standard form dealer agreement in issue, and had there been a total default, the nation's potato dealers would have owed the Corporation $700,286,000. Yet the total cost of the program in 1946, according to the Department of Agriculture, had been "approximately $80,000,000". 93 Cong. Rec. 5731 (1947).

maintain prices. As this Court said in *Rodgers* v. *United States*, 332 U.S. 371, 374-375 (1947):

> "The purpose of Congress in requiring payment of penalties into the Federal Treasury for marketing above the allotted amount was not to raise revenue for the Government's financial advantage but to deter farmers from planting and marketing more than their quotas. In fact, the whole philosophy of the Agricultural Adjustment Act is based on the theory that the public will be benefited, not damaged, if farmers produce and market within these quotas, thereby avoiding the payment of penalties."

The penalties established by Congress, however, were but a fraction of the "liquidated damages" here demanded by the Corporation. For example, the penalties for cotton were originally established at 2¢ per pound if marketed in the first marketing year and 3¢ per pound if marketed in a subsequent year.* This was later considered by the Congress to be "too low to result in the desired adjustment of the amount to be marketed during the year"** and was increased to 50% of the basic loan rate for cooperators,*** which loan rate was 85% of the parity price for cotton,**** or a net of 42.5% of the parity price of cotton.

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* Agricultural Adjustment Act of 1938, Sec. 348, 52 Stat. 59.

** H. R. Rep. No. 364, 77th Cong., 1st Sess., 3(1941); See *Rodgers* v. *United States, supra*, at p. 375.

*** Act of May 26, 1941, c. 133, § 3, 55 Stat. 205, as amended, 55 Stat. 860. In the 1949 Act, which replaced the Act cited, penalties are fixed at 50 per cent of the parity price for cotton, with interest from the date due. Act of Aug. 29, 1949, c. 518, 63 Stat. 670, 7 USC § 1346 (Supp. III, 1950). Penalties under this Act and its predecessors are assessed only on cotton marketed in excess of the established quota, and not on the total quantity of cotton marketed by non-cooperating farmers. *Ibid.*

**** Act of May 26, 1941, c. 133, § 10(a), 55 Stat. 205.

It was this sanction in an amount equal to 42.5% of the parity price of the product in question which this Court reviewed in *Rodgers* v. *United States, supra.* The question was whether interest from the date due should be added to the penalties assessed. The Court observed (332 U.S. at p. 374):

> "The contention is hardly supportable that the Federal Government suffers money damages or loss, in the common law sense, to be compensated for by interest, when one convicted of a crime fails promptly to pay a money fine assessed against him. The underlying theory of that penalty is that it is a punishment or deterrent and not a revenue-raising device . . .",

and went on to say:

> "Viewed in light of these principles, we think that the question of interest on the penalties provided in the Agricultural Adjustment Act on non-cooperators should be governed by the rule previously applied by this Court to criminal fines."

Nor would the Court imply an intent on the part of Congress that interest should be added "to these high penalties". The Court noted that non-cooperators were not entitled to other benefits conferred by the Act and concluded (332 U.S. at p. 376):

> "We are unable to say that it would be consistent with the Congressional purpose for the courts to add interest to these very substantial penalties already imposed upon non-cooperating farmers."

With the penalty of 42.5% on the parity price of cotton considered in the *Rodgers* case is to be compared

the "damages" of 112% of parity price demanded by the Corporation in this case. Surely if the amount assessed under the Agricultural Adjustment Act was so clearly of a penal nature and so large that an intent to increase the penalty by adding interest thereto would not be implied, a sum assessed for the same purpose and almost three times that amount must be considered a penalty, and a sum "so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at", *Wise* v. *United States, supra,* at p. 365. The sum is so exorbitant that the Court is required to state in this case as it did in *Kothe* v. *R. C. Taylor Trust, supra,* at p. 226, that the "amount thus stipulated is so disproportionate to any damage reasonably to be anticipated in the circumstances disclosed that we must hold the provision is for an unenforceable penalty."

B. *THE AGREEMENT STIPULATED THE SAME EXORBITANT SUM AS "DAMAGES" FOR DEFAULTS OF WIDELY VARYING CHARACTER AND EFFECT.*

The decision below also appears to be in conflict with the decisions of other courts of appeals in failing to give effect to the fact that the $3.00 per hundredweight "liquidated damage" provision applied to a large number of defaults of widely varying character and effect. In *Futrall* v. *Triplett*, 84 F. (2d) 861 (8th Cir. 1936), for example, the court, in denying enforcement to a "liquidated damage" claim, stated (at p. 867):

> "But most important, as clearly determining the nature of the $100,000 payment called for, it is to be observed that it is equally applicable to each and every stage in the performance of the conditional sales contract."

Although this is not conclusive (see *Wise* v. *United States,* 249 U.S. 361), courts have uniformly considered this a most persuasive circumstance tending to make the provision unenforceable as a penalty. *Davy* v. *Crawford,* 147 F. (2d) 574, 575 (App. D. C. 1945); Restatement, Contracts, §339, comment b.

The court below ignored this "most important" fact. Yet it is apparent from the face of the contract itself, that even the most trivial breaches, as well as others which might be called substantial, result equally in the $3.00 per hundredweight forfeiture.

Under the Corporation's standard form of Dealer Agreement here in issue, the dealer became obligated to the Corporation in the amount of $3.00 per hundredweight in the event he (1) purchased ineligible potatoes, or (2) purchased potatoes of an ineligible grower, or (3) paid for potatoes less than the applicable support price, or (4) failed to comply with directions from the Corporation to withhold potatoes from the market, or (5) sold ineligible potatoes belonging to another person, or (6) sold potatoes belonging to an ineligible grower. (Art. 11, R. 8a-9a.) The contract further required petitioner to include a provision in all contracts for the sale of potatoes other than for domestic food and seed purposes which would require the purchaser to pay to the Corporation the same sum for each hundredweight or fraction thereof of potatoes used for purposes other than those for which they were sold (Art. 9, R. 8a).

Perhaps most significantly, the contract otherwise protected the Corporation against all possible out-of-pocket losses, as, for example, where a dealer sold U. S. #1 potatoes purchased from an ineligible vendor to the Corporation. The contract expressly provided that the provision for "liquidated damages" was cumula-

tive—that is, it was "not intended to take the place of any obligation of Dealer to refund to CCC any monies which he collected without being entitled thereto." (Art. 11, R. 9a).

These transactions to which the $3.00 "damage" clause applies are of widely varying character. Without attempting to elaborate on the obvious possibilities, it may suffice to point out that a dealer who inadvertently paid an eligible grower a price 1¢ below the applicable support price would become liable to the Corporation for $3.00 for each hundredweight so purchased, yet the mistake could not possibly have any commensurate effect on the operations of the Corporation.

Nor is the matter a theoretical one. The provision has been applied in this case to a situation where there could not possibly be damages to the Corporation. One of the lots of 300 sacks of potatoes obtained by petitioner from Wright was in poor shape. Petitioner accepted the lot on the understanding he would get what he could out of them (R. 67a). A substantial proportion of these potatoes turned out to be afflicted with soft rot and to be worthless (R. 68a). These potatoes could not possibly have replaced any other potatoes in the market, yet for each such hundred weight sack the Corporation seeks $3.00 as "liquidated damages."

Finally, the character of the provision must be noted. It had nothing to do with the purchase and sale of potatoes in any normal commercial sense, or the consequences of any failure or delay in delivering such potatoes. The cases enforcing provisions for liquidated damages for delay in Government contracts and for breach of exclusive dealing contracts between marketing cooperatives and their members, relied on by

the Court of Appeals (R. 88-90), are therefore not apposite.

The important purpose of the provision here in issue was rather, as respondent itself has emphasized, to enforce its program and to deter petitioner and others from failing to abide by its regulations in the stated respects (R. 50a-51a, 25a-26a). *Cf. Rodgers* v. *United States, supra,* at pp. 374-375. Normally money sanctions designed to deter and not to compensate are known as penalties; indeed that is the very definition of the term. *Ibid.* Such money sanctions cannot be considered otherwise where, as here, the sanction for an inadvertent breach is a sum 60 times the interest of the promisor in the transaction which constitutes the breach. Such a provision must necessarily "smack of a penalty". See *Irving Trust Co.* v. *A. W. Perry, Inc., supra,* at p. 311; *Cf. L. P. Steuart & Bro., Inc.* v. *Bowles,* 322 U.S. 398, 406. Moreover, it is clear that "compensation was not the objective aimed at", a circumstance which the Court recognized in *Wise* v. *United States, supra,* at p. 365, would cause it to refuse to enforce a provision for "liquidated damages".

II.

THE INSTANT CASE PRESENTS A VITAL QUESTION AS TO THE FREEDOM OF GOVERNMENT AGENCIES TO IMPOSE ARBITRARY AND EXCESSIVE MONETARY SANCTIONS BY CONTRACT, A QUESTION OF EXTREME IMPORTANCE IN THE PRESENT EMERGENCY.

The decision of the Court of Appeals in this case runs directly counter to a rule of public policy grounded on fundamental principles of equity which has evolved out of the decisions of the courts over a period of many years. The rule refusing to enforce provisions

for "liquidated damages" which are not reasonable forecasts of actual damages which may be sustained from the breach of the contract in question is a useful and necessary check on arbitrary and exorbitant exactions in contracts, including those between Government agencies and citizens of the United States, and promotes equal justice for all.*

The contract here in issue is not unique. It is but one of hundreds of substantially identical agreements entered into between the Corporation and dealers in potatoes throughout the country and is perhaps one of thousands of Government contracts which include provisions for "liquidated damages" designed to spur adherence to the regulations of the contracting agency.

The reason for the rule which denies enforcement to provisions for "liquidated damages" which overstep the bounds of equity is eloquently demonstrated by the facts of this case.

Petitioner is a dealer in potatoes. In 1947 the potato market was "supported" by respondent. The program was designed to benefit growers of potatoes by guaranteeing to them a fair price for potatoes grown under the program. As a dealer, petitioner was faced with the practical alternatives of signing up for the program or discontinuing his business of dealing in potatoes. The choice was obvious, but the price of signing up was acceptance of the standard "Dealer Agreement" of the Corporation. There was not here that "equality of opportunity for understanding and

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* Compare Armed Services Procurement Act of 1947, Sec. 6, 62 Stat. 24, 41 U.S.C. § 155 (Supp. III, 1950), wherein Congress authorized the Comptroller General on the recommendation of the agency head concerned to remit liquidated damages for delay in all procurement contracts subject to that Act "as in his discretion may be just and equitable."

insisting upon their rights" to which the Court adverted in *Wise* v. *United States, supra,* at p. 366, in noting a present disposition of the Courts to enforce reasonable provisions for liquidated damages in contracts.

In the event, petitioner did sign up for the program. Unfortunately petitioner made one mistake involving in the aggregate 1.5% of its business. For that single error, which the trial court found was inadvertent (R. 78a), a finding which has not been contested by respondent (R. 84), the Corporation seeks to assess as "liquidated damages" a sum approximating petitioner's total earnings from the potato business for the season. For each unauthorized transaction, the Corporation assesses against a cooperating dealer an amount some 60 times the earnings of the dealer on the transaction! The imposition of such extreme and disproportionate monetary sanctions in public contracts challenges that equality under law which is fundamental to our system of Constitutional Government. *Cf. Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-330; *Rodgers* v. *United States, supra,* at p. 373.

Nor can it be contended that the exorbitant money sanctions imposed by the Corporation on dealers in potatoes as the price of participation in the price support program are justified by the Congressional mandate, which is perfectly general,* just as it was in

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* The 1947 crop Irish potato price support program was made effective under the so-called Steagall Amendment, Act of July 1, 1941, c. 270, 55 Stat. 498, 56 Stat. 768, 15 U.S.C. § 713a-8, which provided:

> "Whenever during the existing emergency the Secretary of Agriculture finds it necessary to encourage the expansion of production of any non-basic agricultural commodity, he shall make public announcement thereof and he shall so use the funds made available * * * to him for the disposal of agricultural commodities, through a commodity loan, pur-

Priebe & Sons, Inc. v. *United States, supra.* There the Court said in reply to a contention by the Government that the rule was inapplicable to Government contracts (332 U.S. at pp. 413-414):

> "We are pointed, however, to no provision by which the Congress authorized the imposition of penalties as sanctions to that program; nor do we find any. We cannot infer such a power. The power to purchase on appropriate terms and conditions is, of course, inferred from every power to purchase. But if that is the source of congressional authority to impose penalties, then any procurement officer, in war or in peace, could impose them. That is contrary to the premise underlying all our decisions on this question which involve government contracts. The rule which they announce has been applied both to the exigencies of war (*United States* v. *Bethlehem Steel Co., supra*) and of peace (*Wise* v. *United States, supra*). The other view is such a radical break with the past and so counter to the whole development of the law as to indicate that the congressional purpose should be plain before we take the step."

It is of particular importance in this period of national emergency and increased participation by the

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chase, or other operation * * * so as to support, during the continuance of the present war and until the expiration of the two-year period beginning with the 1st day of January immediately following the date upon which the President by proclamation or the Congress by concurrent resolution declares that hostilities in the present war have terminated, a price for the producers of any such commodity with respect to which such announcement was made of not less than 90 per centum of the parity or comparable price therefor. * * *"

Government in the economic affairs of the nation that confusion as to the proper scope of provisions for "liquidated damages" in contracts between the United States and its citizens should be avoided. Confusion in the premises is likely to follow if the Court of Appeals' disregard of that fundamental principle of contract law which rules unenforceable unconscionable penalty provisions in public and private contracts is permitted to stand. The question is one of such importance as to warrant a review of the decision below by this Court.

CONCLUSION.

WHEREFORE, this petition for a writ of certiorari to the Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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